SUPREME COURT, U. S.

FILED

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-1358

LOUIS W. PARKER,

Petitioner,

vs.

MOTOROLA, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

INTRODUCTION.

The decision of the Court of Appeals presented no "new" interpretation of the statutes noted by petitioner (35 USC 103, and 282); no change in the applicable decisions of this Court; no conflict between various circuits; and no conflict with Rule 52 FRCP.

There are, therefore, no special and important reasons for this Court to review the decision of the court below on certiorari.

QUESTIONS PRESENTED.

The three "questions presented" by petitioner are grossly misleading, if not actually fictitious, and find no foundation in the

facts. Findings 32 and 37 are referred to but are not quoted in the petition, and the discussion is misleading, at best. For some reason reference is made to page 236 of the decision below as reported in 188 USPQ 225, (petition p. 3), though such decision is printed in Appendix C with the petition, and was published in 524 F. 2d 518. For the Court's information, the text on that page of USPQ extends from the word "possessed" in the second paragraph on A19c[1] through the word "and" in line 6 on A22c. Although the "questions" pose no basis for grant of certiorari, the following accurate framing of the subject matter illustrates their misleading character as presented, and in that respect a restatement based on the decision below may be of assistance to this Court in determining that certiorari should not be granted.

1. Did the Court of Appeals err in holding the four claims in suit void for obviousness under 35 USC 103 based upon a detailed and accurate analysis and evaluation of the documentary evidence available in the years 1935-1948 including prior art patents and a publication, as well as petitioner's own tuning eye tube indicator coinvented in 1935 (A17c-25c), all available prior to the filing in 1950 of the patent in suit, precisely as this Court had treated the prior art and the patent in suit in *Graham* v. *Deere*, 383 U. S. 1, 22-26 (1966) in satisfying the time requirement in 35 USC 103, the relevant portion of which is:

> "A patent may not be obtained . . . if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. . . ."?

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1. Pages preceded by "A" are to Petitioner's appendix, and those by "B" to Respondent's Supplemental Appendix. Petitioner will generally be referred to as "Parker", and respondent as "Motorola". When the petition is referred to, the page is indicated.

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2. Did the Court of Appeals err in exercising their authority to review the decision of the trial court and the documentary evidence and the testimony which they discussed at length and found to differ materially from findings on the prior art, and in reversing the District Court after determining that "the non-obviousness findings" were clearly erroneous (A25c)?

3. Considering that the patent in suit had been issued by the Patent Office without citing prior art relied upon by Motorola, did the Court of Appeals err in holding that the reason for the presumption of validity in 35 USC 282 was thereby dissipated and the presumption weakened, and in holding that in "these circumstances a court must as a minimum scrutinize the patent claims in suit more closely than when the presumption is at full force" (A3c, 4c), and in actually so doing and reversing the District Court on the validity of such claims?

STATEMENT OF THE CASE.

The questions presented and the extremely sparse alleged statement of the case, the discussion of decisions, and in fact, the entire petition generally exhibits no respect for the actual record in the case. The decisions relied upon appear to be either misinterpreted or have no application in this petition so far as the evidence herein and the decision of the Court of Appeals are concerned. It is difficult or substantially impossible to respond to them because there is no page reference within the body of the decision to indicate that upon which Parker is relying. This misleading and inaccurate total and somewhat chaotic presentation requires first, a corrected statement of facts, and those will be taken from the decision of the Court of Appeals which accurately recites the facts from the record. These facts are taken essentially wholly from documentary evidence in which there can be no dispute of facts. Parker has shown nothing to the contrary in his petition.

Parker patent 2,773,119 in suit issued on December 4, 1956 from an application filed April 4, 1950. The patent expired

December 4, 1973, prior to the entry of the amended judgment on February 1, 1974, from which Motorola appealed to the Court of Appeals (B1). Hence, there is no continuing public interest such as that for a patent with a present or future useful life.

The District Court was misled by Parker, as illustrated by that court's findings of fact which refer to his '119 patent circuit as a "vestigial sideband intercarrier television circuit", and Parker uses that misleading description of his circuit in this petition (A20c, 21c). The receiver can be so characterized, but as the Court of Appeals clearly pointed out from the record, it is immaterial and irrelevant so far as the operating circuitry for the claimed combination is concerned. The word "intercarrier" describes the circuitry of a prior art Parker patent, and "vestigial sideband" describes a technique required by the FCC since 1945 (A6c, 7c). The words so used by Parker thus come directly from prior art subject matter and lend no novelty to the claimed circuitry in issue.

The '119 patent discloses both a television receiver and a radio receiver which are each manually tuned, and the circuit for each receiver utilizes the combination of a receiver part and a tuning indicator part, the latter being disclosed in the patent as a tuning eye tube which visually indicates to the operator of the receiver when peak tuning is reached. The "tuning indicator circuit is exactly that and no more," and the visual indication does not affect the picture in the television receiver, nor does it affect the reproduction in the radio receiver (A5c, 6c). The four claims in issue break down into corresponding two parts comprising (1) a receiver and (2) "indicating means", with the receiver being the intercarrier sound receiver disclosed in the prior Parker patent 2,448,908 ('908) that issued on September 7, 1948 and expired seventeen years later in 1965. In 1935 Parker coinvented "indicating means" as a tuning eye tube such as that in the '119 patent and merely added that "indicating means" in a tuning indicator circuit to the intercarrier sound receiver of his prior '908 patent (A9c and B3, 4).

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Parker makes no reference in his petition to the important fact that the prior '908 patent receiver is of the superhetrodyne type, as is that same receiver in the '119 patent. The superheterodyne circuit provides an IF signal at the output of the IF amplifier which energizes the indicator circuit and causes the tuning eye tube to indicate the condition of tuning in such receiver (A9c). The signal for operating the indicator or tuning eye tube is not specifically referred to in the findings, but Findings 39, 40 and 41 (A8b) do otherwise accurately reflect the relevant evidence, and these findings correspond to the description in the decision of the Court of Appeals. Finding 40 describes the combination in the '119 patent of a superheterodyne receiver and a tuning eye tube circuit. Thus, Parker has omitted from his sparse alleged Statement Of The Case this most significant information on the receiver.

During the prosecution of the '119 patent, the Patent Office Examiner rejected the four claims 39, 41, 58 and 61 which were the predecessors of the four claims in suit (A3b). In responding Parker by amendments and arguments relative to each of such claims made it clear that it was the *tuning indicator* added to the *receiver from his prior '908 patent* which he was asserting as the patentable improvement in the '119 application claims (A11c, 12c and footnote on A12c and 13c). Such assertions during the prosecution thus recognized that there were two parts to the four claimed combinations, the receiver from the prior '908 patent and a tuning indicator.

In addition to the prior Parker '908 patent which issued in 1948 on an application filed by Parker in 1944, the prior art upon which Motorola relied and which was not cited by the Patent Office nor offered by Parker to the Examiner consisted of (A17c):

1. Holmes Patent 2,056,607 issued October 6, 1936.
2. Foster patent 2,121,736 issued June 21, 1938.
3. Chittick patent 2,123,001 issued July 5, 1938.

4. Mountjoy patent 2,135,946 issued November 8, 1938.
5. National Radio Institute Study Manual 31 FR-1 (1946).
6. Parker coinvented tuning tye tube indicator in 1935 (A24c).

The Court of Appeals pointed out that all of the above first five numbered documents disclosed a superheterodyne receiver providing a signal at the output of the IF amplifier, and this is the signal which would actuate a tuning eye tube indicator (A23c). Chittick, upon which Motorola particularly relied, is a radio receiver (A6c) with superheterodyne circuitry and a tuning eye tube as a visual indicator of peak tuning. The sole purpose of the indicator circuitry is to provide visual indication of optimum tuning. Holmes is a superheterodyne television receiver manually tuned to peak position with an indicator circuit that permits the video or picture carrier signal to reach the picture tube for display as a picture only when the receiver is properly tuned (A23c, 24c).

After a detailed discussion of the patent in suit, the prosecution of the four claims in the Patent Office for Parker's interpretation of his alleged invention in those claims, and a discussion of the prior art as applied to such claims, the Court of Appeals held (A25c):

> ". . . To combine this circuitry with a tuning eye tube of the type invented by Parker in 1935, as was done in the Chittick device, and the intercarrier television receiver of the '908 patent would also have been obvious to one skilled in the art in light of the fact that this type of circuitry had been used in providing tuning indicators to the prior art receivers cited by Motorola, having a carrier signal or signals at the output of the IF amplifier precisely as does the '119 patent receiver."

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PARKER RELIES PRINCIPALLY UPON AN ALLEGED FAILURE TO MEET GRAHAM v. DEERE, 383 U. S. 1 REQUIREMENTS, WHEN IN FACT THE COURT OF APPEALS SCRUPULOUSLY FOLLOWED SUCH DECISION.

The issue in *Graham* v. *Deere, supra,* was "obviousness" under 35 USC 103, and the answer to Parker's allegation is found on pages 21 to 26 of the *Graham* decision wherein this Court discussed the structure of the '798 patent in suit, referred to the prosecution as affecting the interpretation of the claims, and then described the prior art. Previously in that decision this Court had stated (p. 17):

> "While the ultimate question of patent validity is one of law, *A. & P. Tea Co.* v. *Supermarket Corp., supra,* 340 US at 155, 95 L ed at 168, the § 103 condition, which is but one of three conditions, each of which must be satisfied, lends itself to several basic fundamental inquiries. Under § 103, the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined. . . ."

This Court pointed out that Graham obtained a patent in 1950 on a plow (patent 2,493,811) which solved some of the difficulties in the art. In 1950[2] Graham modified the '811 patent structure and filed an application said to be an improvement over the '811 patent which issued as patent 2,627,798 ('798) in 1953. Considering the prior '811 Graham patent, and a prior Glencoe clamp device which had not been before the Patent Office, this Court discussed the details of the prior Graham patent plow and the Glencoe clamp device relative to the structure of the '798 Graham patent in suit, and concluded that the differences over this prior art were obvious ones (p. 26).

2. Coincidentally, Parker filed his '119 patent application in 1950 after receiving his prior '908 patent in 1948, and the '119 patent was said to be an improvement over his prior patent by the addition of the indicator.

In other words, the '798 Graham patent there in suit was held invalid over the prior art available in 1950 when the application for such patent was filed. No reference whatsoever was made in the *Graham* decision to testimony or other evidence which Parker now asserts is necessary for "assessing the prior art as to the state of mind of one skilled in the art as of the time of the invention, some 20 years prior to trial" (petition p. 13).

It is crystal clear that the Court of Appeals in 1975 herein discussed the prior art in the time frame prior to 1950 when the Parker '119 patent was filed. This is precisely as this Court in 1965 had done in *Graham* v. *Deere, supra,* in setting the requirements for "obviousness" (A17c, 18c). The requirements of such decision have been well and properly met by the Court of Appeals entirely contrary to Parker's assertions in the present petition.

Parker has identified as "First", "Second", and "Third" sections in his argument on "The Law Involved" (petition pp. 5-11), suggesting that such sections relate to the three questions as Parker presented them for consideration. In no instance, does Parker identify the page in the decision cited for the law which he is arguing. It appears that the manner most helpful to this Court is to respond to this section of the petition in the order in which the decisions are referred to, and where it seems that the page or pages have been found, Motorola will indicate the same.

As to the argument under "First" (petition pps. 5, 6), and *Graham* v. *Deere, supra,* Motorola has shown that the Court of Appeals scrupulously followed the mandate of this Court in such decision.

Parker refers to a "synergistic result", but just as the District Court provided no evidence supporting Finding 37, Parker points to no evidence supporting what is merely a conclusion both in the finding and in his present petition.

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As to the "Second" point, Parker refers to *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 US 271, 69 S. Ct. 535, 93 L. Ed. 672, as well as the second decision in that case, 339 U. S. 605, 94 L. Ed. 1097. There was a materially different factual situation there than here in those two decisions emanating from a single decision in the Seventh Circuit Court of Appeals. It appears that Parker is pointing to the first decision in his argument on the "clearly erroneous" rule, where on page 275 of 336 U. S., this Court held:

> "The rule requires that an appellate court make allowance for the advantages possessed by the trial court in appraising the significance of conflicting testimony and reverse only 'clearly erroneous' findings. These are manifestly supported by substantial evidence and the Court of Appeals found them supported by the weight of the evidence—indeed found the evidence to warrant support of the patent even in matters not found by the trial court. A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review *concurrent findings of fact* by two courts below in the absence of a very obvious and exceptional showing of error." (Emphasis added.)

There are no "concurrent findings of fact" in the present case; the Court of Appeals not only found the findings on unobviousness as being clearly erroneous (A25c), but prior to reaching this conclusion in the decision, the Court discussed the evidence at length and found no support for such findings. The Court of Appeals, in reversing the District Court here, discussed only documentary evidence (A20c-25c) and Parker's own testimony, so the credibility of witnesses is not an issue. Parker points to no evidence and supplies no reference to the record supporting his conclusionary arguments in the present petition. There are no findings of the trial court referring to evidence contrary to that discussed by the Court of Appeals.

If Parker noted page 797, *Weller Manufacturing Co.* v. *Wen Products, Inc.*, 231 F. 2d 795 (7 Cir., 1956), there was a

materially different situation there, for that court stated on that page that "[T]he circumstances of this case take the issue out of that category of decisions where the evidence consists entirely of documentary evidence, . . ." Here the Court of Appeals discussed the evidence relied upon to invalidate the patent wholly from the prior patents and publications themselves, the file history, and then testimony of the plaintiff himself.

There is nothing to indicate why *Jeoffrey Manufacturing* v. *Graham*, 219 F. 2d 511 (5 Cir., 1955) was cited. That case involved the two Graham patents referred to in *Graham* v. *Deere, supra*, and Graham patent 2,637,798 held invalid for obviousness in *Graham* v. *Deere, supra*, was held valid and infringed in *Jeoffrey, supra*, case. There was a conflict with the decision of the Eighth Circuit Court of Appeals from which this Court granted certiorari that resulted in the *Graham* v. *Deere, supra*, decision. There is no such conflict for the Parker '119 patent.

A study of *U. S.* v. *National's Association of Real Estate Boards*, 339 U. S. 485, 94 L. Ed. 1007, suggests no reason for citing that decision. It conforms precisely to the interpretation by this Court of Rule 52 FRCP under which a finding of fact can be set aside if it is "clearly erroneous". Although the District Court here in Findings 38 and 40 found respectively, that the Motorola receivers in issue and the Parker receiver were both of the superheterodyne type, there was no reference to the fact that the prior art receivers which were relied upon by the Court of Appeals were likewise of the superheterodyne type (A7b. 8b). The District Court characterized them by the irrelevant type "vestigial intercarrier television receiver" (A6b, 7b, 20c). There is no basis for arguing that the Court of Appeals here gave the facts a *construction different* from any findings of fact which are actually supported by the evidence in this case. The Court of Appeals merely recited the facts as they are and the decision conformed in every respect with *National Association of Real Estate Boards, supra.*

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Parker repeatedly argues that there is evidence supporting his assertions but points to none. Parker, and one of his witnesses at the trial, identified the television receiver in the '119 patent as that in the prior '908 patent (A6c). Parker himself testified on cross-examination that he had co-invented in 1935 a tuning eye tube indicator such as that used in the '119 patent, and that the function in 1935 was no different than the function in the '119 patent (B3, 4). He confirmed that testimony on redirect (B4). Repeated conclusionary assertions in the petition are hardly an acceptable substitute for the actual facts in the record. There is nothing in *Williams Manufacturing Co.* v. *United Shoe Machinery Corp.*, 316 U. S. 364, 62 S. Ct. 1179, 86 L. Ed. 1537, contrary on facts to the law followed by the Court of Appeals in evaluating the old combination in the '119 patent providing an old result. Also, in *Williams Manufacturing Co., supra* (86 L. Ed. 1542), it is evident that there were concurrent findings in the two courts below, while here the Court of Appeals found the critical findings to be "clearly erroneous".

The Court of Appeals here followed a normal interpretation for the application of Rule 52 FRCP such as that in *Anderson* v. *Federal Cartridge Co.*, 156 F. 2d 681 (8 Cir., 1946).

The Court of Appeals here based its decision on documentary evidence of the prior art and conflicting testimony is not involved.

Parker cites no particular page from the decision in *Walling* v. *General Industries Co.*, 330 U. S. 545, 67 S. Ct. 883, 91 L. Ed. 1088, and nothing is found in that decision contrary to the procedure and the conclusion here.

In *Lichter* v. *Goss*, 232 F. 2d 715 (7 Cir., 1956), it may be that page 719 is the relevant page, but that court simply followed the established law requiring that findings of fact shall not be set aside unless clearly erroneous. That court found that the findings of fact were supported by substantial evidence, contrary to the findings here on unobviousness.

There is a reference to Rule 52a in *Zenith Radio Corporation* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 23 L. Ed. 2d 129, on page 148 of 23 L. Ed. 2d, but again the Court of Appeals followed closely the mandate of this Court that "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." That is precisely the principle followed here.

With reference to the presumption of validity (petition pp. 8-10) Parker apparently has developed a theory that claim 14 should be treated differently than the other three claims in suit simply because as claim 58 in the application no amendment was made to that claim. All of the prior art not cited by the Patent Office is discussed with the total claimed subject matter, and amending or not amending a claim during the prosecution in the Patent Office has nothing to do with that. The presumption of validity under 35 USC 282, was properly evaluated by the Court of Appeals with respect to all claims (A3c). *Leeds & Catlin* v. *Victor Talking Machine Co.*, 213 U. S. 301, 318, 53 L. Ed. 805 (1908) has no application here.

ALL REASONS ARGUED AS TO WHY THE WRIT SHOULD BE GRANTED ARE NOT BASED UPON THE FACTS HERE, NOR THE EVALUATION OF THE EVIDENCE BY THE COURT OF APPEALS.

Parker has shown no conflict with any decision of this Court, nor with that of any court of appeals. No important Federal question is involved. He simply misrepresents the facts, misinterprets or misapplies the authorities cited, without any page reference to the principle which he relies upon in such authorities, and he argues at length without any factual support or any support in law for his arguments. In all, he is simply asking this Court to grant certiorari, and in effect retry this case involving a patent which expired on December 4, 1973.

In a similar manner Parker apparently believes that by repetition facts will in some way be assumed by this Court. He refers four times to a "synergistic result" (petition pp. 4, 5, 6 and 8).

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In *Anderson's-Black Rock* v. *Pavement Salvage Co.*, 396 U. S. 57, 61 (1969), this Court discussed a "synergistic result" in terms of a combination of elements which results "in an effect greater than the sum of the several effects taken separately." The Court of Customs and Patent Appeals in a patent decision, *Application of Davis*, 305 F. 2d 501, 504 (1962) referred to a dictionary definition wherein "the total effect is greater than the sum of the two effects taken independently."

To add to a known receiver, a known tuning indicator, each of which performs as it had in the prior art, and with that known tuning indicator having no effect on the operation of the receiver and the receiver having no effect on the tuning indicator except to provide a signal to operate the tuning indicator as it would operate with a corresponding signal from any source, is not a condition to produce a synergistic result (A19c, 20c, 25c). Parker refers to no evidence contrary to this.

In his conclusion (petition p. 15) Parker states that this "case is a mirror image of *Bernard A. Sakraida* v. *Ag Pro, Inc.*, 481 F. 2d 668 (5 Cir., 1975)", and that "this case is also identical on the issues of Rule 52" FRCP in that decision. In that decision which was rendered in 1973, not "1975", the Fifth Circuit Court of Appeals remanded the case to the district court "with directions to enter a judgment holding the patent valid," subject however to certain procedural actions in the trial court. It is a fact that the *Sakraida, supra*, litigation is before this Court, for certiorari was granted and the appeal was argued on March 3, 1976. Nothing is found in the present record which provides a basis for Parker's characterizations noted above.

CONCLUSION.

All authorities agree with the result reached in the Court of Appeals. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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R 1423

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 71-603-Civ-NCR

LOUIS W. PARKER
Plaintiff

vs.

MOTOROLA, INC.,
Defendant

ORDER

FILED
FEB 1 1974
JOSEPH L. BOGART
CLERK, U. S. DIST. CT.
SOUTHERN DIST. OF FLA.
FORT LAUDERDALE, FLA.

THIS CAUSE is before the Court on defendant's Motion to Amend the Judgment.

Upon consideration of the record in this cause, it is

ORDERED AND ADJUDGED that the judgment entered in the above-entitled cause on October 31, 1973, be and hereby is amended by striking out the words "or their substantial equivalents," appearing in lines 4 and 5 of paragraph numbered 5 of the judgment, and inserting in lieu thereof the words "as described in paragraph 3 above and as stipulated by the parties before this Court on October 4, 1972, from," so that paragraph numbered 5 shall read:

> 5. Plaintiff, Louis W. Parker, is entitled to recover of defendant the damages which he has sustained by reason of the said defendant's manufacture, use or sale of the said infringing television receivers as described in paragraph 3 above and as stipulated by the parties before this Court on October 4, 1972, from on and after April 20, 1965.

DONE AND ORDERED this 1st day of February, 1974

Norman C. Roettger, Jr.
United States District Judge

cc- Malin & Haley
Foorman L. Mueller, Esq.
DiGuilian, Spellacy, Bernstein, Lyons & Sanders
Att. John F. Spellacy

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TESTIMONY.

[R75] By Mr. Mueller:

Q. Does the tuning eye indicator that you have disclosed in your 119 patent, have anything to do with the tuning of the picture in the television receiver portion?

A. Definitely. It indicates to the man when to tune correctly.

Q. Now, we are referring to the function which you have just testified to.

A. Yes.

Q. Does the indication actually affect the—and I'm using affect as a-f-f-e-c-t.

A. Yes, I understand.

Q. Does it actually affect the picture on the picture tube ot the television receiver?

A. The indication itself on the tuning eye does not have an effect on the picture.

Q. When did you first learn of a tuning eye tube, Mr. Parker?

A. Dumont and I invented it in 1935.

Q. And between 1935 and 1950 did you have occasion to use tuning eye tubes?

A. I do not remember. I might have.

[R76] Q. In your work with Dr. Dumont on the tuning eye tube, did you operate a tuning eye tube at the Dumont's company?

A. Different kinds of tuning eye tubes, dozens of them of different types, yes, sir. We were all working on them.

Q. Was the function of the tuning eye tube with which you were connected in 1935 and '36, was that function any different than the function of the tuning eye tube in your 119 patent?

A. Not that I can recall.

Q. That had a luminous arc?

A. Yes.

Q. And the arc, the position of the arc opened or closed depending upon what you were indicating?

A. Correct.

Q. Is that correct?

A. Yes.

* * * * *

Redirect Examination by Mr. Malin.

[R80] Q. In reference to the tuning eye that you were mentioning in reference to the 119 patent, you stated that the function was no different than it was when you first invented it.

A. That is correct.

[R81] Q. This function you were talking about, are you talking about the function of the visual indication?

A. Yes.

Q. Are you talking about any further function?

A. No.

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